A

PP

v.

MOHD NOOR JAAFAR

B

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CRIMINAL REVISION NO: MT1-43-2-2004]
5 AUGUST 2005

C ***CRIMINAL PROCEDURE:*** *Prosecution - Right to conduct prosecution - Whether Public Prosecutor may authorise in writing an officer of any Government department to conduct a criminal prosecution before any court under Criminal Procedure Code - Whether authorisation of an officer from Islamic Religious Department to conduct criminal prosecution in* D *magistrate's court is valid and constitutional*

CRIMINAL PROCEDURE: *Jurisdiction of court - Extent of criminal jurisdiction of Syariah courts*

CONSTITUTIONAL LAW: *Courts - Jurisdiction - Whether* E *magistrates court has jurisdiction to hear criminal charges under Control of Islamic Religious Schools (Malacca) Enactment 2002*

CONSTITUTIONAL LAW: *Jurisdiction - Courts - Determining whether a matter falls within jurisdiction of civil or syariah court -* F *"Subject matter approach"*

One Mohd Noor bin Jaafar was charged in the magistrate's court for maintaining a Religious School which was not registered pursuant to s. 5(1) of the Control of Islamic Religious Schools (Malacca) Enactment 2002 ("the charge"). Pursuant to a G certificate issued under s. 376(iii) and s. 377(b) of the Criminal Procedure Code ("CPC"), learned deputy public prosecutor (DPP) gave his authorisation or consent to the Syarie Prosecutor to conduct the prosecution against the said Mohd Nor bin Jaafar in relation to the charge in the magistrate's court. H

In the course of proceedings, the learned magistrate stayed the proceedings under s. 30 of the Courts of Judicature Act 1964 ("the CJA 1964") and referred the following questions which arose as to the effect of some provisions of the Federal I Constitution: (1) Whether the letter of authorisation or consent issued by a DPP pursuant to s. 376(iii) and s. 377(b) of the CPC

authorising a Syarie Prosecutor of the Islamic Religious Department Malacca to prosecute in a magistrate's court, is constitutional? (Question 1); and (2) Whether ss. 33 and 34 of the Control of Islamic Religious Schools (Malacca) Enactment 2002 ("the Enactment") which confer jurisdiction upon a first class magistrate ("magistrate") to try an offence under that Enactment are constitutional? (Question 2).

The learned DPP submitted that under s. 377(b) and s. 376(i) and (iii) of the CPC read with art. 145(3) of the Federal Constitution and s. 3 of the Interpretation Acts 1948 and 1967, a DPP is empowered to authorise or give consent to an officer of a government department to prosecute a person charged with an offence under the Enactment. Counsel for the accused contended that under art. 145(3), the Attorney General has no power to institute, conduct or discontinue any proceedings for an offence in any Syariah court, and that in the State of Malacca, by virtue of s. 66(2) of the Administration of the Religion of Islam (State of Malacca) Enactment 2002, the power to institute, conduct or discontinue any proceedings for an offence before a Syariah court is vested in the Chief Syariah Prosecutor who has general control and direction over all Syarie prosecutors in the state. The accused further submitted that s. 377(b) of the CPC excluded a Syarie prosecutor who is only authorised to appear in the Syariah court, and that the Public Prosecutor ("PP") may only authorise an officer to conduct criminal prosecution in the magistrate's court if that officer has at the outset the *locus standi* to appear thereat.

Held:

[1] From the provisions of s. 376 and art. 145(3), it is clear that the Public Prosecutor ("PP"), or interchangeably the Attorney General, shall have control and direction, institution and discontinuance of all criminal prosecutions and proceedings under the CPC, and in the discharge of such duties and powers, the PP may appoint any fit and proper person to be a DPP. (p 113 A)

[2] For the purposes of conducting a criminal prosecution before any court under the CPC, the PP personally where the rights and powers are vested in or exercisable by the PP personally, under s. 68(ii) or s. 376(iii), or a DPP in any other case, may authorise in writing an officer of any

A Government department to do so, but that does not include a criminal prosecution in eg, a Syariah court: art. 145(3). (p 113 C)

[3] Except in the cases in which the rights and powers must be B exercised by the PP personally, in relation to the exercise of all or any of the powers vested in or exercisable by the PP under the CPC or any other written law, s. 3 of the Interpretation Acts 1948 and 1967 provides that the expression "Public Prosecutor" means the Attorney General, C and includes (within the scope of his authority) a DPP appointed under any written law relating to criminal procedure and also a person authorised by any such law to act as or exercise all or any of the powers of the PP or a DPP. (p 113 D - E)

D **[4]** In the present case, the letter of authorisation or consent was given by the learned DPP to the Syarie Prosecutor to conduct prosecution in the magistrate's court and sessions court. The officer was from the Islamic Religious Department which is undoubtedly a Government department E as envisaged in s. 377(b)(3) of the CPC, and the conduct of prosecution in relation to the charge is also subject to the control and direction of the PP. The expression "PP" in s. 34(1)and (2) of the Enactment would include a DPP. (p 113 F - G)

F **[5]** The letter of authorisation or consent to authorise the officer from the Islamic Religious Department to conduct the prosecution in the magistrate's court was valid and constitutional. Hence, Question 1 was answered in the G affirmative. (p 114 C - D)

[6] Section 33 of the Enactment expressly provides that a magistrate shall have jurisdiction to try any offence under the Enactment. The vesting of this jurisdiction in the magistrate's H court is consistent with federal law provided under s. 85 of the Subordinate Courts Act 1948. As the jurisdiction to try the offence as alleged in the charge herein had been expressly conferred upon a magistrate, it meant that it is not a matter in which a Syariah court enjoys exclusive I jurisdiction, and so there can be no contravention of art. 121(1A) under which a civil court ceases to have jurisdiction if and only if a particular matter comes within the jurisdiction of the Syariah court. (pp 117 H - I & 118 A)

[7] In respect of criminal jurisdiction specifically, the Syariah courts shall only have jurisdiction in respect of offences in so far as conferred by federal law. Under s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 the criminal jurisdiction which Parliament has conferred upon the Syariah courts is clearly circumscribed in the sense that it is confined to offences against the precepts of the religion of Islam by persons professing that religion which may be prescribed by any written law. (p 118 C & G)

[8] The nature of the offence under s. 5(1) of the Enactment does not belong to the category of offences against the precepts of the religion of Islam and so it is clearly not within the exclusive jurisdiction of the Syariah courts. Support for this view may be found in the "subject matter approach". The "pith and substance approach" adopted by the majority decision of the then Supreme Court in *Mamat bin Daud & Ors. v. Government of Malaysia* [1988] is analogous to the "subject matter approach". (p 119 A - C)

[9] Since the subject matter in this case concerned the registration of an Islamic religious school and not the precepts of the religion of Islam, there was no doubt that the Malacca State Legislature has clearly intended to exclude the subject matter from the jurisdiction of the Syariah courts and instead conferred the jurisdiction on a magistrate. It was not a matter within the jurisdiction of the Syariah courts. (p 119 D - E)

[10] In the circumstances, ss. 33 and 34 of the Enactment, when tested against art. 121(1) and (1A), are valid and constitutional. The answer to Question 2 was therefore also in the affirmative. (p 120 A)

[Reference of said two questions to Federal Court for decision.]

Case(s) referred to:

Abdul Hamid v. PP [1956] 22 MLJ 231 ***(refd)***

Ang Theam Choom v. PP [2002] 4 CLJ 538 CA ***(refd)***

Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor [1991] 3 CLJ 2768 SC ***(refd)***

Dato' Hari Menon v. Texas Encore LLC & Ors [2005] 2 CLJ 688 HC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1981] 1 MLJ 29 ***(refd)***

Faridah Begum Abdullah v. Sultan Hj Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah (Sued In His Personal Capacity) [1996] 2 CLJ 159 SC ***(refd)***

Mamat Daud & Ors v. Government of Malaysia [1988] 1 MLJ 119 ***(refd)***

Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur [1997] 4 CLJ Supp 419 HC ***(refd)***

Mohamed Habibullah Mahmood v. Faridah Dato Talib [1993] 1 CLJ 264 SC ***(refd)***

Pai San & Ors v. PP [2002] 4 CLJ 547 CA ***(refd)***

Soon Singh Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 2 CLJ 5 FC ***(refd)***

Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***

The Islamic Council of Penang & Butterworth v. Shaik Zolkaffily [2003] 3 CLJ 289 FC ***(refd)***

Legislation referred to:

Administration of the Religion of Islam (State of Malacca) Enactment 2002, ss. 49(3)(a), 50(2)(a), 66(2)

Control of Islamic Religious Schools (Malacca) Enactment 2002, ss. 5(1), (3), 33, 34

Courts of Judicature Act 1964, ss. 30(1), (2), 84(3)

Criminal Procedure Code, ss. 376(1), (3), (4), (i), (iii), (iv), 377(b)(3)

Federal Constitution, arts. 74(1), 77, 121(1), (1A), 145(3)

Interpretation Acts 1948 and 1967, s. 3

Penal Code, ss. 33, 392, 298A, 457

Subordinate Courts Act 1948, s. 85

Syariah Courts (Criminal Jurisdiction) Act 1965, s. 2

For the accused - Mohamed Hanipa (Hj Muhamad Hj Burok, Abdullah Abd Karim, Khairuddin Othman & Firdaus Zakaria with him); M/s Muhamad & Co

For the prosecutor - Abdul Rashid Hj Daud

Reported by Amutha Suppayah

JUDGMENT

Low Hop Bing J:

Reference

In the course of proceedings in the magistrate's court Malacca, the learned magistrate has stayed the proceedings under s. 30 of the Courts of Judicature Act 1964 ("the CJA 1964") and referred some questions which arose as to the effect of some provisions of the Federal Constitution. The parties herein have agreed that these questions are:

1. Whether the letter of authorisation or consent dated 27 September 2004, issued by a deputy public prosecutor pursuant to s. 376(iii) and s. 377(b) of the Criminal Procedure Code authorising a Syariah Officer (Syarie Prosecutor) of the Islamic Religious Department Malacca to prosecute in a magistrate's court, is constitutional? (Question 1); and

2. Whether ss. 33 and 34 of the Control of Islamic Religious Schools (Malacca) Enactment 2002 ("the Enactment") which confer jurisdiction upon a first class magistrate ("magistrate") to try an offence under that Enactment are constitutional? (Question 2).

Factual Background

On 28 September 2004, one Mohd Noor bin Jaafar was charged in the magistrate's court as follows:

> Bahawa kamu pada 6 Februari 2004, jam lebih kurang 10.45 pagi bertempat di No. 7, Jalan TAKH 1, Ayer Keroh Heights dalam Daerah Melaka Tengah dalam negeri Melaka telah menyenggarakan Sekolah Agama iaitu Tadika Pasti Al-Kauthar yang tidak didaftarkan menurut seksyen 5(1) Enakmen Pengawalan Sekolah-Sekolah Agama Islam (Melaka) 2002 dan dengan demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 5(3) Enakmen yang sama.

[My translation:

That you on 6 February 2004, at about 10.45am at No. 7, Jalan TAKH 1, Ayer Keroh Heights in the district of Malacca Tengah in the state of Malacca did maintain a Religious School to wit Tadika Pasti Al-Kauthar which was not registered pursuant to s. 5(1) of the Control of Islamic Religious Schools (Malacca) Enactment 2002 and that you have thereby committed an offence punishable under s. 5(3) of the same Enactment.] ("the charge").

On 27 September 2004, pursuant to a certificate issued under s. 376(iii) and s. 377(b) of the Criminal Procedure Code ("CPC"), learned deputy public prosecutor (DPP) Encik Abdul Rashid bin Hj. Daud has given his authorisation or consent to Encik Mohd Saifuddin bin Othman, Syariah Officer (Syarie Prosecutor) to conduct the prosecution against the said Mohd Nor bin Jaafar in relation to the charge in the magistrate's court.

Principles Of Constitutional Interpretation

As the questions herein involve issues of validity and constitutionality of the aforesaid written laws which are to be tested against arts. 145(3) and 121 of the Federal Constitution, it is appropriate for me to refer to the relevant principles of constitutional interpretation.

In *Dato' Menteri Othman bin Baginda & Anor v. Dato' Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29, Raja Azlan Shah CJ (now HRH the Sultan of Perak), speaking in a panel of five judges of the Federal Court at p. 32, concisely set out the principles of interpreting a constitution in the following words:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way – 'with less rigidity and more generosity than other Acts' (see *Minister of Home Affairs v. Fisher* [1979] 3 All ER 21. A constitution is suis generis calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: 'A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms.' The principle of interpreting constitutions 'with less rigidity and more generosity' was again applied by the Privy Council in *AG of St. Christopher, Nevis and Anguilla v. Reynolds* [1979] 3 All ER 129 at p 136.
>
> It is in the light of this kind of ambulatory approach that we must construe our Constitution. ... .

These principles were applied by Mohd Azmi FC (as he then was) in *Faridah Begum bte Abdullah v. Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah (Sued In His Personal Capacity)* [1996] 2 CLJ 159 SC; and also by me in *Dato' Hari Menon v. Texas Encore LLC & Ors* [2005] 2 CLJ 688, 705 and 706.

In *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481, the Court of Appeal through the judgment of Gopal Sri Ram JCA further expounded the following principles:

> Generally speaking, the rules of construction that guide a court in the interpretation of ordinary statutes apply with equal force when interpreting the Federal Constitution. But there are important differences. For, the Federal Constitution, unlike any ordinary statute, does not merely declare the law. It creates and regulates the law-making power of the federation. It also creates and defines the various branches of government. It confers upon individuals certain fundamental and inalienable human rights, such as equality before the law. Its language must accordingly receive a broad and liberal construction in order to advance the intention of its framers. Or as Lord Diplock put it in *Attorney-General of The Gambia v. Momodou Jobe* [1984] AC 689 at p 700:
>
> > A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.
>
> A court, while rendering a broad and liberal construction to the language employed by the Federal Constitution, is not entitled 'to stretch or pervert the language of the enactment in the interests of any legal or constitutional theory, or even for the purpose of supplying omissions or of correcting supposed errors'. (Per Gwyer CJ in *Re Central Provinces & Berar Sales of Motor Spirit & Lubricants Taxation* Act AIR [1939] FC 1.) This general rule is, however, subject to an important qualification. Where the language of the constitution is open to two constructions, a court should adopt the construction 'which will ensure the smooth and harmonious working of the constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provisions of existing law nugatory'. (Per Shelat and Grover JJ in *Kesavananda Bharati v. The State of Kerala* AIR [1973] SC 1461 at p 1581.) Thus, a court, for the purpose of rendering a harmonious interpretation, is entitled to make implications into the language of the constitution. An implication here refers to something that 'explains, perhaps limits, the effect of what is expressed'. (Per Windeyer J in *Victoria v. Commonwealth* [1971] 122 CLR 353 at p 401.)

Question 1

Learned DPP Encik Abdul Rashid bin Hj. Daud submitted that under s. 377(b) and s. 376(i) and (iii) of the CPC read with art. 145(3) of the Federal Constitution and s. 3 of the Interpretation Acts 1948 and 1967, a DPP is empowered to authorise or give consent to an officer of a government department to prosecute a person charged with an offence under the Enactment. *Abdul Hamid v. Public Prosecutor* [1956] 22 MLJ 231; *Ang Theam Choom v. Public Prosecutor* [2002] 4 CLJ 538; and *Pai San & 13 Lagi v. Pendakwa Raya* [2002] 4 CLJ 547 were cited in support.

A reference to an article hereinafter is a reference to that article in the Federal Constitution unless the context otherwise requires.

Learned counsel Encik Mohamed Hanipa, Hj. Muhamad bin Hj. Burok, Encik Abdullah bin Abd. Karim, Encik Khairuddin bin Othman and Encik Firdaus bin Zakaria contended for the accused that under art. 145(3), the Attorney General has no power to institute, conduct or discontinue any proceedings for an offence in any Syariah court, and that in the State of Malacca, by virtue of s. 66(2) of the Administration of the Religion of Islam (State of Malacca) Enactment 2002, the power to institute, conduct or discontinue any proceedings for an offence before a Syariah court is vested in the Chief Syariah Prosecutor who has general control and direction over all Syarie prosecutors in the state.

They added that s. 377(b) of the CPC excluded a Syarie prosecutor who is only authorised to appear in the Syariah court, and that the PP may only authorise an officer to conduct criminal prosecution in the magistrate's court if that officer has at the outset the locus standi to appear thereat.

In my judgment, the importance of s. 376(i), (iii) and (iv) and 377(b) of the CPC as amended *vide* Act A1015 would, where relevant, merit reproduction as follows:

> 376. Public Prosecutor
>
> (i) The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under the Code.
>
> (ii) …

(iii) The Public Prosecutor ... may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor .... by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor ... personally ... .

(iiiA) ...

(iv) The rights and powers vested in or exercisable by the Public Prosecutor ... by subsection (iii) and section 68(ii) shall be exercisable by the Public Prosecutor personally ... .

377. Conduct of prosecutions in Court

Every criminal prosecution before any Court ... shall, subject to the following sections, be conducted:

(a) ...

(b) subject to the control and direction of the Public Prosecutor, by the following persons who are authorised in writing by the Public Prosecutor:

(1) ...;

(2) ...;

(3) an officer of any Government department;

(4) ...;

(5) ... ;

(6) ...

... .

Further, art. 145(3) reads:

145. Attorney General

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

From the foregoing provisions of s. 376 and art. 145(3), it is clear that the Public Prosecutor ("PP"), or interchangeably the Attorney General, shall have control and direction, institution and discontinuance of all criminal prosecutions and proceedings under the CPC, and in the discharge of such duties and powers, the PP may appoint any fit and proper person to be a DPP.

For the purposes of conducting a criminal prosecution before any court under the CPC, the PP personally where the rights and powers are vested in or exercisable by the PP personally, under s. 68(ii) or s. 376(iii), or a DPP in any other case, may authorise in writing an officer of any Government department to do so, but that does not include a criminal prosecution in e.g. a Syariah court: art. 145(3).

Except in the cases in which the rights and powers must be exercised by the PP personally, in relation to the exercise of all or any of the powers vested in or exercisable by the PP under the CPC or any other written law, it is pertinent to note that s. 3 of the Interpretation Acts 1948 and 1967 provides that the expression "Public Prosecutor" means the Attorney General, and includes (within the scope of his authority) a DPP appointed under any written law relating to criminal procedure and also a person authorised by any such law to act as or exercise all or any of the powers of, the PP or a DPP.

The factual background herein shows that the letter of authorisation or consent was given by the learned DPP to Encik Mohd. Saifuddin bin Othman as a Syariah Officer (Syarie Prosecutor) to conduct prosecution in the magistrate's court and sessions court in Malacca. The officer is from the Islamic Religious Department which is undoubtedly a Government department as envisaged in s. 377(b)(3) of the CPC, and the conduct of prosecution in relation to the charge is also subject to the control and direction of the PP.

Pursuant to an amendment *vide* Enactment No. 8 of 2003, the word "Director" in s. 34(1)and (2) of the Enactment has been substituted with the words "Public Prosecutor" so that the PP's power to give consent or authorisation to prosecute is vested in the PP in consonance with art. 145(3), and the expression "PP" as alluded to above would include a DPP.

The general words "rights and powers" appearing in s. 376(iii) of the CPC have been construed in *Abdul Hamid v. PP, supra*, by Smith J who at 232, left column, opined that consent need not be given personally by the PP but a DPP is permitted to do so. This view is further fortified in *Pai San & Ors v. PP, supra*, at p. 556 g-h where Abdul Hamid JCA (now FCJ) in delivering judgment of the Court of Appeal held, *inter alia*, that the consent to prosecute given by a DPP to a fishery officer to prosecute is valid and constitutional.

In the instant case, I am of the view that the letter of authorisation or consent to authorise the officer from the Islamic Religious Department to conduct the prosecution in the magistrate's court is valid and constitutional.

Hence, I hold that the answer to Question 1 is in the affirmative.

Question 2

The prosecution takes the view that:

1. ss. 33 and 34 of the Enactment are *intra vires* art. 121(1A), as evident from art. 121(1) and (1A) read with para 1 in the State List, Ninth Schedule to the Federal Constitution ("the State List");

2. under art. 121(1) and (1A), the jurisdiction and powers of the courts are those conferred by or under federal law, except any matter within the jurisdiction of the Syariah courts; and

3. the criminal jurisdiction of the Syariah courts as conferred by federal law is to be found in s. 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965 ("the 1965 Act") which should be construed by applying the "subject matter approach", citing *The Islamic Council of Penang & Butterworth v. Shaik Zolkaffily* [2003] 3 CLJ 289; *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara & Anor, supra;* also on appeal to the Federal Court in [1992] 2 MLJ 241; and *Mohamed Habibullah bin Mahmood v. Faridah bte Dato Talib* [1993] 1 CLJ 264.

The defence conceded that the Malacca State Legislature has the power to enact ss. 33 and 34 of the Enactment being a matter in the State List but contended that the pith and substance of the Enactment deals with matters relating to Islam and so the only proper forum to try any offences under the Enactment shall be the Syariah court, so that the jurisdiction conferred on the magistrate's

court clearly contravenes art. 121(1A), seeking support in *Mamat bin Daud & Ors v. Government of Malaysia* [1988] 1 MLJ 119; *Soon Singh a/l Bikar Singh v. Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 2 CLJ 5; *Dalip Kaur v. Pegawai Polis Daerah, Balai Polis Daerah, Bukit Mertajam & Anor* [1991] 3 CLJ 2768 FC; *Mohamed Habibullah, supra; and Md Hakim Lee v. Majlis Agama Islam Wilayah Persekutuan, Kuala Lumpur* [1997] 4 CLJ Supp 419 HC.

I shall ascertain the merits or otherwise of the defence contention by examining the defence authorities.

First, in *Mamat bin Daud, supra,* the petitioners were charged with an offence under s. 298A of the Penal Code for doing an act which was likely to prejudice unity among persons professing the Islamic religion. The issue before the Supreme Court was whether s. 298A as enacted by Parliament was *ultra vires* art. 74(1). In other words, who should make this law – Parliament or the State Legislature? The issue relates to the legislative competence of either Parliament or the State Legislature. In a majority judgment, the then Supreme Court held that reading the section as a whole, it was a colourable legislation in that it pretends to be a legislation on public order when in pith and substance it is a law on the subject of the Islamic religion and so it was held that only the State Legislature has the power to legislate under arts. 74 and 77.

It is to be observed that the issue of the legislative competence of the Malacca State Legislature does not arise before me as the defence has conceded that the Enactment in general and ss. 33 and 34 in particular have been enacted by the Malacca State Legislature with every legislative competence, and so there is no question of contravening arts. 74 and 77, in which case the majority judgment of the then Supreme Court renders no assistance to the defence.

Next, in *Soon Singh a/l Bikar Singh, supra,* where the appellant had filed an originating summons in the Kuala Lumpur High Court seeking a declaration that he was no longer a Muslim after he has renounced Islam to which he had converted while he was a minor. Counsel for the Kedah Islamic Council raised a preliminary objection against the application, contending that the High Court had no jurisdiction as the matter came under the jurisdiction of the Syariah courts. The decision of the learned High Court Judge in

upholding the objection was affirmed by the Federal Court as art. 121(1A) had taken away the jurisdiction of the civil courts in respect of the matters within the jurisdiction of the Syariah courts.

A strikingly similar situation arose in *Md Hakim Lee, supra*, where Abdul Kadir Sulaiman J (now JCA) held that the High Court had no jurisdiction, as the conversion to and renunciation of the Islamic faith came within the exclusive jurisdiction of the Syariah courts.

It is clear to me that the identical issue in *Soon Singh, supra*, and *Md Hakim Lee, supra*, related to the conversion to and renunciation of the Islamic faith which are within the jurisdiction of the Syariah courts, in which case under art. 121(1A), the civil courts have no jurisdiction.

However, the subject matter before me is completely different, as it begs the question as to whether the offence relating to the non-registration of Islamic Religious Schools comes within the exclusive jurisdiction of the Syariah court.

In my view, the relevant statutory provisions which require my consideration are of ss. 5, 33 and 34 of the Enactment and art. 121(1) and (1A). These provisions, where relevant, merit reproduction as follows:

> 5. Registration of religious schools.
>
> (1) Subject to subsection (2), no person or body of persons may establish or maintain a religious school unless the religious school is registered in accordance with the provisions of this Enactment.
>
> (2) ...
>
> (3) Any person who contravenes subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding three years or to both and in the case of a continuing offence, to a further fine not exceeding three hundred ringgit for each day or part of a day during which the offence continues after conviction.
>
> 33. Jurisdiction to try offences.
>
> The court of the First Class Magistrate shall have the jurisdiction to try all offences under this Enactment.

34. Institution of prosecution.

(1) No prosecution for or in relation to any offence under this Enactment shall be instituted except by or with the written consent of the Public Prosecutor (as amended vide Enactment No. 8 of 2003).

(2) ...

121. Judicial Power of the Federation.

(1) There shall be two High Courts of co-ordinate jurisdiction and status namely:

(a) one in the States of Malaya, which shall be known as the High Court in Malaya ...; and

(b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak ....

(c) (Repealed)

and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.

(1A) The courts referred to in clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts.

In my view, s. 5(1) prohibits e.g. the maintenance of a religious school except where the school has been registered pursuant to the provisions thereof, while s. 5(3) provides for the punishment of a fine not exceeding RM5,000 or imprisonment not exceeding three years or both, and a fine of RM300 per day or part thereof for the continuance of the offence after conviction pursuant to s. 5(1).

Section 33 expressly provides that a magistrate shall have jurisdiction to try any offence under the Enactment. The vesting of this jurisdiction in the magistrate's court is consistent with federal law provided under s. 85 of the Subordinate Courts Act 1948 which more specifically confers upon a magistrate the jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or with fine only, and offences under ss. 392 and 457 of the Penal Code.

As the jurisdiction to try the offence as alleged in the charge herein has been expressly conferred upon a magistrate, it means that it is not a matter in which a Syariah court enjoys exclusive jurisdiction, and so there can be no contravention of art. 121(1A) under which a civil court ceases to have jurisdiction if and only if a particular matter comes within the jurisdiction of the Syariah court.

In respect of criminal jurisdiction specifically, the Syariah courts shall only have jurisdiction in respect of offences in so far as conferred by federal law. In this context, the federal law is contained in the Syariah Courts (Criminal Jurisdiction) Act 1965 which was enacted by Parliament *vide* Act 355 and enforced from 1 April 1965. More specifically s. 2 thereof reads:

> Criminal Jurisdiction of Syariah Courts
>
> 2. The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:
>
> Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.

Under s. 2, the criminal jurisdiction which Parliament has conferred upon the Syariah courts is clearly circumscribed in the sense that it is confined to offences against the precepts of the religion of Islam by persons professing that religion which may be prescribed by any written law.

That brings me to the consideration of the charge in question under s. 5(1) of the Enactment, in which no person or body of persons may establish or maintain a religious school (in this case, Tadika Pasti Al Khauthar) unless it is registered in accordance with the provisions of the Enactment.

A In my judgment, the nature of the offence under s. 5(1) does not belong to the category of offences against the precepts of the religion of Islam and so it is clearly not within the exclusive jurisdiction of the Syariah courts.

B Support for my view may be found in the "subject matter approach" expounded in the judgment of Haidar Mohd Noor CJ (Malaya) who spoke for the Federal Court in *The Islamic Council of Penang & Butterworth v. Shaik Zolkaffily, supra,* by looking at the State Enactment to see whether or not the Syariah courts have C been expressly conferred jurisdiction on a given subject matter. The Federal Court rejected the "remedy prayed for" approach.

The "pith and substance approach" adopted by the majority decision of the then Supreme Court in *Mamat bin Daud, supra*, is, in my view, analogous to the "subject matter approach" herein. D

Since the subject matter before me concerns the registration of an Islamic religious school and not the precepts of the religion of Islam, there can be no doubt that the Malacca State Legislature has clearly intended to exclude the subject matter from the E jurisdiction of the Syariah courts and instead conferred the jurisdiction on a magistrate. In other words, it is not a matter within the jurisdiction of the Syariah courts.

The expression "jurisdiction of the Syariah courts" in art. 121(1A) F came up for judicial interpretation by the Court of Appeal in *Sukma Darmawan Sasmitaat Madja, supra.* Gopal Sri Ram JCA who delivered the judgment of the court held that the expression refers to "the exclusive jurisdiction of the Syariah courts". The Court of Appeal added that if a person professing the religion of Islam does G a proscribed act which is an offence both under the Penal Code (FMS 45) and the Syariah Criminal Offences (Federal Territories) Act 1997 ("the 1997 Act"), then the courts referred to in art. 121(1) *viz.* High Court, sessions court or magistrate's court will have jurisdiction to try such an offence, and that it is only in H respect of offences under the 1997 Act that a Syariah court may have exclusive jurisdiction. This interpretation has received the approval and affirmation of the Federal Court in [1999] 2 MLJ 241 through the judgment of Eusoff Chin CJ (Malaysia) (as he then was) at p. 247 C-G.

I

In the circumstances, I hold that ss. 33 and 34 of the Enactment, when tested against art. 121(1) and (1A), are valid and constitutional.

The answer to Question 2 is therefore also in the affirmative.

Sections 30 And 84 Of The Courts Of Judicature Act 1964

As the above questions were transmitted by the magistrate to me in the High Court under s. 30(1) of the CJA 1964, and a decision on these questions is necessary for the determination of the proceedings in the magistrate's court, I have pursuant to s. 30(2) of the Courts of Judicature Act 1964 dealt with this reference in accordance with s. 84 of the same Act, as if it were a case before me in the original jurisdiction of the High Court and refer the above two questions to the Federal Court for a decision thereon by the Federal Court, by way of a special case stated under s. 84(3) thereof.